Supreme Court, U.S.
FILED
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1996

MARION URICHICH, ET AL.,

Petitioner,

VS.

CITY OF YOUNGSTOWN, ET AL.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

MARION URICHICH, PRO SE
508 N. Main Street
Poland, Ohio 44514
(330) 757-0340

34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has a Common Pleas Court (county trial court) the right under the Constitution of Ohio and/or the Constitution of the United States deny Petitioner a trial by Petitioner's peers in a viable litigation. The record in this litigation substantiates without a reasonable doubt that the said litigation in Case No. 91 CV 1428 in the Court of Common Pleas, Mahoning County, Ohio, is and was a viable litigation for compensatory damages and/or punitive damages.

A decision by the Supreme Court of Ohio was issued on March 6, 1996, O.S.C. Case No. 95 2258, after the Respondent's Briefs that were filed before the Court. Petitioner never received Respondent's Briefs that were filed before the Court. Petitioner never received Respondent's Memorandum in Response of Jurisdiction filed on December 1, 1995. Encompassed within said document are lies, half truths, and a serious attempt to mislead the Supreme Court of ohio by this dastardly document that came into my possession (See Exhibit A.) after the Supreme Court rendered its decision (See Exhibit B.) during an inquiry by Petitioner pertaining to the decision that was rendered by the Ohio Supreme Court.

It is the opinion under the circumstances by the Petitioner that if the facts were known by the Ohio Supreme Court, the Court would have returned this litigation back to the trial court for its decision was made based upon lies and half truths in Respondent's Brief pertaining to the facts of the case without the knowledge of Petitioner.

A major issue to be decided in the context of this case is whether any or all of the disputed issues of fact if resolved by the tier of fact in favor of the Respondents, constitute wilful and wanton misconduct and/or wanton and reckless manner which in turn, will remove the umbrella of immunity conferred by statute, Matkovich vs. Penn Central Trans. Co. 1982 69 Ohio St. 2d 210.

Whether a government entity can confiscate, destroy and/or deprive a citizen of his or her rights to property, held by deed free of encumbrances, without adequate compensation financial or otherwise unless a state of emergency exists and/or martial law has been declared.

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PETITION FOR CERTIORARI

JURISDICTION

The final judgment of the Supreme Court of Ohio was decided on March 6, 1996. Jurisdiction is proper pursuant to 28 U.S.C. 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. (2 and 3)

FEDERAL STATUTES INVOLVED

Fifth Amendment
Fourteenth Amendment
Bill of Rights - Article VII

STATEMENT OF THE CASE

This case represents four critical issues: (1) whether any or all of the disputed issued of fact if resolved by the tier of fact in favor of the Petitioners, constitute willful and wanton misconduct and/or wanton and reckless manner which in turn, will remove the umbrella of immunity conferred by statute. Matkovich vs. Penn Central Trans. Co. 1982 69 Ohio St. 2d 210.

(2) The Supreme Court of Ohio decided Case No. 95-2258 from the information in the briefs of Petitioner and Respondent. There is, without a reasonable doubt, overwhelming evidence in the depositions of Fireman, Mr. Rocco Russo, and Fire Captain Mr. Richard Simerlink, that Respondent's brief (without the knowledge of Petitioner due to the fact that Petitioner was not served a copy of Respondent's Response Brief in the Ohio Supreme Court) is filled with false information to the facts in this litigation.

It is appalling and a gross violation by an officer of the court to falsify information placed beofre a court of law to mislead a decision of the court.

(3) Denying Petitioners their right to a jury trial in Case No. C.P. Court 91 CV 1248 is a grave injustice. There is ample evidence in the form of a deposition of Mr. Rocco Russo and Mr. Richard Simerlink and other evidence such as the Ohio traffic accident report that substantiates without a reasonable doubt that the driver of fire truck No. 4 (a ladder truck) acted in a wanton and reckless manner which constitutes willful or wanton misconduct while employed as a fireman for the City of Youngstown, Ohio.

The 11th District Court of Appeals of Ohio decided on Dec. 31, 1990 (sustained by the Ohio Supreme Court) in Peopes et al., Appellees v. City of Willoughby, (1990, 70 Ohio App. 3d page 848) that in fact willful or wanton conduct is a jury question.

Whether a government entity can confiscate, destroy, and/ or deprive a citizen of his or her rights to property, held by deed, free of encumbrances, without adequate compensation financial or otherwise.

Petitioners rely upon U.S. and Ohio constitutional provisions: U.S. Con. Fourteenth Amendment "Due process of law", Fifth Amendment "Depriving of life, liberty, property, without due process of law", Bill of Rights - Article VII "Provides for trial by jury in Civil suits in which the value at stake amounts to more than $20.00".

(4) Petitioners argue that the speed at which Mr. Russo was operating the fire truck while descending the hill on East Dewey Avenue was excessive. Indicative of this, Petitioners point out, is the fact that the collision with their building caused

the entire east masonry wall to collapse, lodging the fire truck inside the building and requiring a tow truck to remove it. Furthermore, police investigation failed to reveal any skid marks left by the fire truck.

In depositions taken from Mr. Rocco Russo, the driver of said vehicle, and others, establishes without a reasonable doubt that fire fighter, Rocco Russo, had followed this particular route on many, many occasions and knew and/or should have known what constituted a safe speed to be able to make the turn on Poland Avenue safely without lodging the fire truck inside the building.

Petitioners cite Matkovich vs. Penn Central Trans. Co. (1982), 69 Ohio St. 2d 21, wherein the Ohio Supreme Court held: "Wanton misconduct is a jury question." Petitioners submit that Respondents' wanton and willful misconduct and/or wanton and reckless conduct, removes the immunity conferred upon them by R. C. 2744.02.

LAW AND ARGUMENT

Proposition of Law No. I: In Matkovich vs. Penn Central Trans. Co. 1982 69 Ohio St. 2d 210.

The purpose of this appeal is to establish as a matter of fact that many material factual issues exist in this case and that a jury of Petitioners' peers, must be given the opportunity to hear all of the evidence to decide the true nature of the facts in this case in so doing will be affording Petitioners due process of law.

One of the issues of fact is speed with which Mr. Russo descended East Dewey Hill. The record shows that Mr. Russo was traveling at a rate of speed that was excessive for descending East Dewey Hill which was in a wanton and reckless manner. Mr. Russo has traversed East Dewey Hill on numerous occasions and admits on his deposition that he was going too fast to begin with and couldn't stop.

Fire Captain Simerlink in his deposition testified Mr. Russo never down shifted but continued down the hill in fourth gear until he ran into Petitioners' building. Mr. Simerlink was seated in the passenger seat next to Mr. Russo.

The collision caused the entire east wall which was a masonry wall to collapse. The fire truck was stuck inside the building and required a tow truck to remove it which indicates the speed with which the truck descended East Dewey Hill.

The accident report written by Officer Lomax indicates that his investigation failed to reveal any skid marks left by the truck. Officer Lomax in his report shows clearly that Mr. Russo drove the truck on the west side of the street which is the wrong lane traveling down the hill which made it impossible for Mr. Russo to make a right or left hand turn.

Proposition of Law No. II: The Constitution of the U.S. and the Constitution of Ohio does not permit under any circumstances to confiscate, destroy, and/or deprive a citizen of his or her rights to property held by deed, free of encumbrances, without adequate compensation, financial or otherwise.

Exhibit A. in Respondents' Memorandum in Response of Jurisdiction, page 3, can only be described as lies to deceive the Supreme Court of Ohio. The depositions of Captain Richard Simerlink, Firemen Rocco Russo, and Officer Lomax clearly refute the lies on page 3 on Respondents' brief.

The evidence placed before the Trial Court and/or Appellant Court established without a reasonable doubt that at the very least Mr. Rocco Russo operated fire truck No. 24 (a ladder truck) owned by the City of Youngstown in a reckless and illegal manner which resulted in said truck operated by Mr. Russo to collide with Petitioners' property on Poland Avenue in such a manner that caused extensive damage to the building and rendered the building unusable without major and costly repairs.

The City of Youngstown then ordered said building to be razed due to the fact that the building now constituted a hazard to public safety. At the time of the accident, Petitioners were assured by city officials that said building would be repaired to bring the building back to its original condition and failed to do so.

Proposition of Law No. III. The first factual issue to be resolved is the training of Mr. Russo.

Admittedly Mr. Russo had been a fire fighter for a period of 35 years at the time of the collision. He was promoted to engineer (now called lieutenant) or operator of a fire truck in April 1964. He then served as engineer until 1978 when he

was named fire chief, and after serving in that position, he returned to his former position as operator of a fire truck, and retired in 1988.

Mr. Russo, at best, was unclear about the training given to him by the Youngstown Fire Department. Mr. Russo stated in his deposition that there " ... is no actual formal training courses ..." in which he participated; that he never had any formal training courses conducted by people outside of the Youngstown Fire Department; that he never participated in any classroom training for which a certificate was awarded; and/or he never received any certificate as a result of the on-the-job training.

On Tuesday, March 10, 1987, the Respondent, Rocco Russo, was employed as a fire fighter with the City of Youngstown Fire Department and was assigned to Station #8 on the Southside of Youngstown. He was then functioning in the position of lieutenant/engineer, the person assigned to drive and operate a fire truck. He was assigned to drive Truck #24, one of two ladder trucks available within the Youngstown Fire Department. Truck No. 24 is a Mack-Built truck weighing approximately 24 tons and with a length of approximately 40 feet.

Despite this awareness of the difference between the trucks and the special training needed to operate #24, Simerlink testified that he trained Mr. Russo for only 2 1/2 hours per day for only 3 days.

On June 30, 1981, Mr. Russo was involved in a traffic accident while driving another city vehicle. Mr. Russo was reprimanded and was placed in classification 33 and was given two points. He was ordered to attend a driver's training course and failed to do so.

Reynolds vs. Oakwood (1987), 38 Ohio App 3d 125, wherein it is stated: O.R.C. 701.02 did not preclude

municipalities from being liable for failure to properly train and instuct police officers (firetruck operators) in the operation of police (fire) vehicles during emergency runs.

Mr. Russo's physical condition from 1985 on until the accident had back surgery, two hip replacements, and a hernia operation and a hernia operation and trouble with both feet which is encompased within the record.

These ailments are important because they all relate to the ability of Mr. Russo to operate a 24 ton fire truck in a safe manner on March 10, 1987.

The shifting and braking of this huge and heavy vehicle requires the use of both legs and hips and back muscles. The record shows that Mr. Russo's physical problems with the knowledge of the City of Youngstown should not have been driving this large heavy fire truck which substantiates Youngstown's wanton misconduct.

In Tighe v. Diamond (1948), 149 Ohio St. 520.37 O.O. 243, 80 N.E. 2nd 122, the court found "in order that one may be guilty of 'wilful misconduct'", an actual intention to injure need not be shown.

Whether a person's actions are willful or wanton misconduct is a question of fact and, therefore, is a jury issue. See Matkovich v. Penn Central (1982), 69 Ohio St. 2nd 210, 214, 23 O.O. 3d 224, 226-227, 431 N.E. 2D 652, 655; Reynolds v. Oakwood (1987), 38 Ohio App. 3d 125, 127, 528 N.E. 2D 578, 582. Given the facts of this case, reasonable minds could have found the City of Youngstown's and Rocco Russo's action willful, wanton and/or reckless misconduct.

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The decision of the trial court threatens all property owners in the State of Ohio and/or United States of America. By its ruling, the trial court undermines legislative intent, ignores the plain meaning of the act, and creates its own unsupported view.

Moreover, the trial court's decision establishes the illogical and untenable rule that a city can confiscate or destroy private property with no authority under law without compensating the private property owner.

The implications of the decision of the trial court affects every citizen of this country and touches the lives of all its people. The public's interest in the orderly and lawful operation of government is profoundly affected by the trial court in this litigation.

If this ruling is to be upheld by this court, the public interest is affected and the constitution of this state and the United States of America will be circumvented by the public servants that have been appointed or elected to protect the rights of all its citizens.

Similarly, the public interest is affected if the plain meaning of a statute duly adopted by the General Assembly can be judicially altered to subvert the legislature's intent to protect government from frivolous and unwarranted litigation.

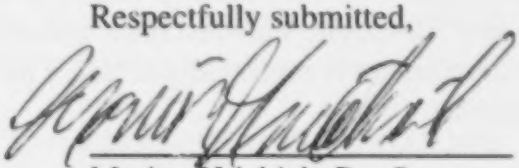
Private property ownership is the cornerstone of this nation and must be protected from government interference, confiscation, and/or destruction without cause and/or compensation.

Petitioners believe that there are organizations that employ constitutional lawyers and/or law firms that would address such an important constitutional question that is being raised in this litigation that in all probability would consider pursuing this litigation.

If in fact, Petitioners were not able, which is very unlikely, to engage counsel that has the expertise and authorized to practice before the Supreme Court, Petitioners would expect this court to decide this monumental question from the record that will be before this court without oral argument, if this Court so chooses.

For the foregoing reasons and many more, the petition for writ of Certiorari should be granted.

Respectfully submitted,



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EXHIBITS

EXHIBIT A

IN THE SUPREME COURT OF OHIO

MARION URICHICH, et al	)	95-2258
	)	
Appellants	)	ON APPEAL FROM THE
	)	MAHONING COUNTY
vs.	)	COURT OF APPEALS,
	)	SEVENTH DISTRICT
CITY OF YOUNGSTOWN, et al	)	APPELLATE DISTRICT
	)	
	)	COURT OF APPEALS
Appellees	)	CASE NO. 93 C.A. 221

MEMORANDUM IN RESPONSE OF JURISDICTION OF APPELLEES, CITY OF YOUNGSTOWN AND ROCCO RUSSO

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Filed
December 1, 1995

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STATEMENT OF THE CASE AND FACTS

This case arises out of a property damage claim filed against the City of Youngstown. On March 10, 1987, a city fire truck responded to a house fire located at 315 Alexander Street. While enroute, the truck, driven by a city employee, Rocco Russo, hit a building owned by the Appellant.

On June 6, 1991, after a prior complaint was filed and voluntarily dismissed, a Complaint for damages was filed on behalf of Marion Urichich and Helen Urichich against the City of Youngstown and Rocco Russo.

On June 26, 1991, responsive pleadings were filed by the Appellees and the discovery process began.

On April 28, 1992, a Motion for Summary Judgment was filed under Ohio Civil Rule 56 on behalf of the City of Youngstown and Rocco Russo.

The Appellees' Motion was granted and the Entry stated; "Defendant, City of Youngstown's Motion for Summary Judgment filed April 28, 1992, is hereby sustained. The Court finds no issue of willful or wanton misconduct of Defendant or Defendant's agent."

On January 27, 1993, Appellants filed a notice of appeal in the Appellate Court.

On September 28, 1993, the Seventh Appellate Court, speaking through an entry stated; "Appeal sua sponte dismissed as there has been no definite disposition of the claim against Rocco Russo".

On October 7, 1993, the Honorable Michael Gerchak signed an entry disposing of all claims and parties before the Court.

On November 1, 1993, a notice of appeal was filed in the above case.

On September 22, 1995, the Seventh District Court of Appeals of Ohio found Appellants' arguments on appeal were without merit and the judgment of the Common Pleas Court of Mahoning County, Ohio was affirmed.

The cause presented for review will show on March 10, 1987, the Appellee, Rocco Russo, within the scope of his employment as a City of Youngstown firefighter drove a truck in response to an emergency call to duty. Appellee began working as a city firefighter in 1952, promoted to engineer in 1964 and in 1978 was Fire Chief of the entire City Fire Department.

In 1981, Appellee was assigned to Station Number 8 as the driver of the ladder truck number 24.

On March 20, 1987, ladder truck number 24, driven by Appellee responded to a house fire. While enroute, the truck proceeded down Dewey Avenue with its overhead lights and siren operational. The truck never exceeded the posted speed limits and as it proceeded down the hill on Dewey Avenue, Appellee geared the truck down and applied the brakes.

As the truck proceeded, it reached a cement divider which separated Dewey's lanes of travel. Captain Simlerlink, seated as the passenger, estimated the truck's speed at between 10 and 15 miles per hour and by the time it reached the end of the divider it was traveling 5 to 10 miles per hour.

As the truck reached the intersection of Dewey and Poland Avenue, Appellee intended to turn onto Poland Avenue but believed it could not be accomplished with safety. The truck proceeded across Poland Avenue onto Appellant's property

where it eventually made contact with his building. Upon impact, the truck was traveling less than two miles per hour.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

A POLITICAL SUBDIVISION UNDER TITLE 2744 OF THE OHIO REVISED CODE MAY UTILIZE OHIO CIVIL RULE 56 TO TERMINATE LITIGATION AND AVOID A FORMAL TRIAL WHERE THERE IS NOTHING TO TRY.

Ohio Revised Code Section 2744 titled Political Subdivision Torte Liability governs the standard to which this matter is to be resolved.

Revised Code Section 2744.02(A)(1) states that a political subdivision in Ohio is provided immunity from civil liability for injury or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or prorietary function.

Ohio Revised Code 2744.02 (B)(1) provides an excetion to the immunity when the injury or loss to persons or property is caused by the negligent operation of any motor vehicle by their employees when said employees are engaged within the scope of their employment and authority. Ohio Revised Code 2744(B)(1)(b) provides an exception to the exception when the driver is a member of a municipal corporation fire department was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct.

Willful or wanton misconduct has been defined in Peoples v. Willoughby (1990), 70 Ohio App. 3d 848.

In Peoples, the Court stated:

> "'Wanton misconduct' comprehends an entire absence of all care for the safety of others and an indifference to consequences.***** It implies a failure to exercise any care toward those to whom a duty of care if owing when the probability that harm will result from such failure is great, and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct.*** Wanton misconduct is positive in nature while mere negligence is naturally negative in character." Emphasis added.

The Peoples Court went further relying on Hawkins v. Ivy (1977), 50 Ohio St. 2d 114 stating the test to establish wanton misconduct has two components: (1) a failure of a driver of an automobile to exercise any care whatsoever toward those to whom he owes a duty and; (2) his failure occurs under circumstances in which there is great probability that harm will result.

In addition, the Peoples Court defined willful misconduct as;

> "***something more than negligence. 'Willful misconduct' imports a more positive mental condition prompting an act than does the term 'wanton misconduct'. ' Willful misconduct' implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.*** The

> word 'willful', used in the phrase, 'willful misconduct', implies intent, but the intention relates to the misconduct and not merely to the fact that some specific act, such as operautomobile, was intentionally done.*** The intention relates to the commission of wrongful conduct, independent of the intent to use certain means with which to carry out such conduct. Emphasis added.

Therefore based on the evidence presented and the lack of any evidence presented by the Appellants other than mere allegations and speculation, a Motion for Summary Judgment was filed, granted and affirmed by the Appellate Court.

Feichtner v. Cleveland (1994), 95 Ohio App. 3d 388 citing Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St. 2d 1, stated a summary judgment is a procedural device to terminate litigation and avoid a formal trial where there is nothing to try.

In the present case, the facts established by the Appellant do not support a finding by a jury that Rocco Russo was guilty of either willful or wanton misconduct.

Therefore, a jury could not have reasonably concluded that willful or wanton misconduct existed and the Motor for Summary Judgment was appropriately filed to avoid a formal trial where there was nothing to try.

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The decision of the Court of Appeals does not threaten the rights of citizens throughout Ohio as suggested by Appellant.

In the present case, the Trial Court and Appellate Court evaluated the facts presented by each party. The evidence was weighed against a constitutional statute which grants political subdivisions immunity for negligent acts and the standard to judge said action. Based on the well documented cases which support Ohio Revised Code 2744 and the cases which support Ohio Civil Rule 56, Appellants' arguments were found to be without merit.

There are no isues which involve a great general interest and none which involve a substantial constitutional question to be answered by this Court. The Appellants' appeal to this Court should not be heard nor allowed to proceed.

Respectfully submitted,

/s/ DAVID CHUPARKOFF
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CERTIFICATION OF SERVICE

A true copy of the Brief in Response of Jurisdiction has been forwarded to Marion Urichich, 508 N. Main Street, Poland, Ohio 44514 by regular U.S. Mail this 2nd day of August, 1996.

/s/ DAVID CHUPARKOFF
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EXHIBIT B

THE SUPREME COURT OF OHIO

83-215 1996 TERM

To wit: March 6, 1996

Marion Urichich et al.,	:	
Appellants,	:	Case No. 95-2258
v.	:	ENTRY
City of Youngstown, Ohio,	:	
et al.,	:	
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Marion Urichich.

(Mahoning County Court of Appeals; No. 93CA221)

/s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

EXHIBIT C

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MARION URICHICH, ET AL,	)	
PLAINTIFFS-APPELLANTS,	)	CASE NO. 93 C.A. 221
	)	OPINION
VS.	)	
CITY OF YOUNGSTOWN, OHIO, ET AL,	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Common Please Court, Case No. 91CV1248
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiffs-Appellants:	Gary Van Brocklin 20 W. Boardman St. Youngstown, Ohio 44503
For Defendants-Appellees:	George A. Chuparkoff David Chuparkoff 42 N. Phelps St. Youngstown, Ohio 44503

JUDGES:

Hon. Joseph E. O'Neill
Hon. Gene Donofrio
Hon. Edward A. Cox

Dated: **September 22, 1995**

COX J.

This matter presents a timely appeal from a decision of the Mahoning County Common Pleas Court, sustaining defendants-appellees, City of Youngstown, Ohio, et al's motion for summary judgment.

Defendant-appellee, Rocco Russo, was a fire fighter employed by appellee, City of Youngstown, and on March 10, 1987, was operating a fire truck owned by the City of Youngstown, in response to a station call that a fire was in progress on Alexander Street. While enroute to the fire, the fire truck's overhead lights were in operation and its siren sounding. While proceeding down a hill on East Dewey Avenue, Mr. Russo was apparently unable to safely stop the truck by applying the brakes and acomplish a turn onto Poland Avenue. The fire truck proceeded across Poland Avenue into a parking lot, eventually striking plaintiffs-appellants, Marion Urichich, et al's building which was located on said lot.

On June 6, 1991, appellants filed a complaint for damages against appellees. Following discovery, appellees filed a motion for summary judgment, which the trial court sustained on October 7, 1993, specifically finding no issue of willful or wanton misconduct on the part of appellees.

Appellants set forth no specific assignment of error on appeal however, they generally allege that the trial court erred in sustaining appellees' motion for summary judgment, thereby denying appellants their right to trial by jury.

Appellants set forth several reasons detailing why Mr. Russo's actions on March 10, 1987, rose to a level of willful and/or wanton misconduct. First, appellants argue that Mr. Russo was inadequately trained to operate a fire truck, having received nor formal or classroom training. Appellants further

claim that Mr. Russo had no training in emergency procedures, received no performance evaluations and was therefore inexperienced to operate the fire truck which he was driving on the accident date.

Second, appellants maintain that Mr. Russo's physical condition impaired his ability to operate the fire truck in a safe manner. Appellants point out that beginning in 1985, Mr. Russo had back surgery, two hip replacements, a hernia operation and trouble with both feet. Appellants contend that the use of both legs and the hip and back muscles are required in order to properly shift and brake the fire truck. Appellants submit that appellee, City of Youngstown, was aware of Mr. Russo's physical problems, and its actions in allowing him to operate the fire truck constitute wanton misconduct.

Finally, appellants argue that the speed at which Mr. Russo was operating the fire truck while descending the hill on East Dewey Avenue was excessive. Indicative of this, appellants point out, is the fact that the collision with their building caused the entire east masonry wall to collapse, lodging the fire truck inside the building and requiring a tow truck to remove it. Furthermore, police investigation failed to reveal any skid marks left by the fire truck.

Appellants cite *Matkovich vs. Penn Central Trans. Co.* (1982), 69 Ohio St. 2d 210, wherein the Ohio Supreme Court held: "Wanton misconduct is a jury question." Appellants submit that appellees' wanton and willful misconduct and/or wanton and reckless conduct, removes the immunity conferred upon them by R.C. 2744.02.

R.C. 2744.02(B), states in pertinent part:

"(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death or loss to persons

> or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:
>
> "***
>
> "(b) A member of a municipal corporation fire department or any other fire-fighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct."

In *Peoples v. Willoughby* (1990), 70 Ohio App. 3d 848, the court indicated that willful or wanton misconduct was something more than negligence; "*** it implies a failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure is great, and such probability is known to the actor." The test to establish wanton misconduct has two components: (1) failure of an automobile driver to exercise <u>any care whatsoever</u> towards those to whom he owes a duty and (2) such failure occurs under circumstances in which there is great probability that harm will result. *Willoughby, supra*. (Emphasis added).

Appellees' actions do not rise to the level of nor do the facts proposed by appellants meet the requirements for wanton or willful misconduct as set foth in *Willoughby, supra*.

The trial court properly sustained appellees' motion for summary judgment. In *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St. 3d 108, the Ohio Supreme Court held:

> "A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production at trial."

Appellants have not brought forth any evidence nor have they demonstrated affirmatively, any facts which would entitle them to relief. Therefore, reasonable minds could not find that Mr. Russo's actions were willful or wanton.

The evidence established that Mr. Russo began learning to drive fire trucks in 1952 and had experience in driving the fire truck used on the accident date for six years prior to that time. (Russo depo. 16, 29). Therewas no evidence presented to indicate that on March 10, 1987, any of Mr. Russo's previous injuries affected his driving ability or operation of the fire truck. Further, Captain Simerlink, who was seated in the fire truck's passenger seat, testified he had no knowledge that Mr. Russo was not physically fit to do the job. (Simerlink depo. 36).

Finally, Captain Simerlink testified that the fire truck's speed was clearly not excessive (Simerlink depo. 46, 56, 59, 61) and Mr. Russo testified that he applied the brakes all the way down the hill on East Dewey Avenue (Russo depo. 108, 110). Therefore, appellees exercised due care in protecting the property and people involved herein and R.C. 2744.02 provides them with immunity for any negligent conduct which may have arisen on March 10, 1987.

Appellants' arguments on appeal are found to be without merit.

The judgment of the trial court is affirmed.

O'Neill, P.J., concurs.
Donofrio, J., concurs.

APPROVED:

/s/ Edward A. Cox

JUDGES.

(2)

Supreme Court, U.S.
FILED
SEP 5 1996
CLERK

No. 96-202

In The

Supreme Court of the United States

October Term, 1995

MARION URICHICH AND HELEN URICHICH,

Petitioners,

vs.

CITY OF YOUNGSTOWN AND ROCCO RUSSO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does Ohio Civil Rule 56 titled "Summary Judgment" violate a citizen's right to a trial by jury or is it a viable tool to end litigation when there is an absence of material facts concerning the essential elements of the case?

LIST OF INTERESTED PARTIES

The Petitioners are Marion Urichich and Helen Urichich.

The Respondents are The City of Youngstown and Rocco Russo.

Each of the Respondents join in this Brief in Opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request the Court deny the petition for Writ of Certiorari seeking review of the Supreme Court of Ohio 95-2258, 1996, term which declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for Writ of Certiorari based on the unquestionable validity of Ohio Civil Rule 56 which patterns Federal Rule 56.

On June 6, 1991, a civil complaint for damages was filed on behalf of Petitioners against Respondents.

On June 28, 1991, Respondents answered and on April 28, 1992, a Motion for Summary Judgment was filed on behalf of the Respondents.

Respondents' Motion for Summary Judgment was granted by the trial court and an appeal was taken to the Seventh District Court of Appeals. The Court of Appeals found Petitioners' arguments to be without merit and the judgment of the trial court was affirmed.

On March 6, 1996, the Ohio Supreme Court through an entry stated:

> "Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question."

On March 10, 1987, the Respondent, Rocco Russo, an employee of the City of Youngstown, driving a city fire truck within the scope of his employment damaged the real property of the Petitioners responding to an emergency.

The truck, driven by the Respondent, proceeded to a fire by way of Dewey Avenue where its speed never exceeded the posted speed limit. When the truck reached the top of Dewey, its speed was between 30 and 35 miles per hour. (Russo depo. p. 93)

The truck proceeded down Dewey where it reached a cement divider separating the lanes of travel. Captain Simmerlink, of the Youngstown Fire Department seated next to the Respondent, stated the truck's speed at the divider was between 10 and 15 miles per hour. Captain Simmerlink also stated that as the truck reached the end of the divider, it was travelling at 5 to 10 miles per hour. (Simmerlink depo. pp. 56, 59)

When the truck reached Poland Avenue at the bottom of Dewey Avenue, Respondent could not turn the truck with safety. The truck proceeded across Poland Avenue into a parking lot where it made contact with Petitioner's building. At the time of the impact, the truck was travelling less than 2 miles per hour. (Simmerlink depo. p. 61)

ARGUMENT

Ohio Revised Code Section 2744.00 titled "Political Subdivision Tort Liability" governs the law to be applied.

Ohio Revised Code Section 2744.01(A) defines an emergency call as:

> "A call to duty including, but not limited to, communications from citizens, police dispatches and personal observations by peace officers or inherently dangerous situations that demand an immediate response on the part of a peace officer."

Furthermore, Section 2744.02(B) states:

> "Except as otherwise provided in this division, political subdivisions are liable for injury, death or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:
>
> > (b) A member of a municipal corporation, fire department or any other fire fighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress *or is believed to be in progress,* or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct.

Willful or wanton misconduct has been defined in *Peoples v. Willoughby,* 70 Ohio App. 3d 848 (1990).

In *Peoples,* the Court stated:

> " 'Wanton misconduct' comprehends an *entire absence of all care* for the safety of others and an indifference to consequences. * * * *It implies a*

> *failure to exercise any care toward those to whom duty of care is owing when the probability that harm will result from such failure is great,* and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct. * * * Wanton misconduct is positive in nature while mere negligence is naturally negative in character." Emphasis added.

In addition, the *Peoples* Court defined willful misconduct as:

> " * * * something more than negligence. 'Willful misconduct' imports a more positive mental condition prompting an act than does the term 'wanton misconduct.' 'Willful misconduct' implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or *purposely doing wrongful acts with knowledge or appreciation* of the likelihood of resulting injury. * * * The word 'willful' used in the phrase, 'willful misconduct', implies intent, but the intention relates to the misconduct and not merely to the fact that some specific act, such as operating an automobile, was intentionally done. * * * The intention relates to the commission of wrongful conduct, independent of the intent to use certain means with which to carry out such conduct." Emphasis added.

Therefore, the issue presented by Petitioners is whether the Court's application and the validity of Civil Rule 56 titled "Summary Judgment" is a valid tool to end litigation.

The Ohio Supreme Court in *Dresher v. Burt*, 75 Ohio St. 3d 280 (1996) using *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) set the standards for a Rule 56 pleading and said issue does not need to be revisited by this Court.

The Ohio Supreme Court using *Celotex* made clear that the moving party bears the responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim.

The Supreme Court went on to state:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the present case, Petitioners failed to meet their burden as determined by the trial court and Court of Appeals and judgment was entered accordingly.

Lastly, in reference to Moore's Federal Practice

> "Whether operating broadly or on a more limited scale the summary judgment procedure is not a substitute for a court or jury trial, as the case may be, of any issue of material fact that is the subject of a genuine dispute. Moore's Federal Practice A S56.04(1), 56.15(1), 56.17(18), 56.18, 56.19 56.20. For this reason, the summary

> judgment procedure does not invade the right of trial by jury in a jury action. Moore's Federal Practice S56.06.

Therefore, a trial was unnecessary because there is no genuine issue as to any material fact, and on the established facts the Respondents were entitled to a judgment as a matter of law.

Pursuant to the United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the petition to the Court's attention.

Petitioner in his question presented for review claims that he has a guaranteed fundamental right to trial by jury making Rule 56 an unconstitutional practice. Unquestionable, said statement is an untruth. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Petitioner misrepresents to this Court that counsel did not serve Petitioner with a copy of its Brief to the Ohio Supreme Court. As shown in Petitioner's own Brief, service was made to him on August 2, 1996. Further Respondents' Brief is neither made up of lies or half-truths nor was there an attempt to mislead the Supreme Court of Ohio.

The Supreme Court of Ohio simply declined jurisdiction and dismissed Petitioner's appeal as not involving any substantial constitutional question which this Court should follow.

Petitioner misleads this Court by stating that the conduct of the Respondent Rocco Russo constituted willful or wanton misconduct.

Petitioner's entire brief is made up of mere allegations with no specific facts showing that a genuine issue of material fact existed for trial. Therefore, Rule 56 was the appropriate tool to end said litigation.

CONCLUSION

The claim of Petitioners is simply that Ohio Civil Rule 56 and Federal Rule 56 of Practice are unconstitutional and cannot be a tool to end litigation.

Ohio case law and prior decisions of this Court are clear that Rule 56 is a viable alternative for cases which have no genuine issue as to any material fact and that on the established facts the movant is entitled to judgment as a matter of law.

To allow Petitioner's Writ, this Court calls into question the validity of Rule 56 where no question exists.

Wherefore, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1996 TERM

To wit: March 6, 1996

Marion Urichich et al., Appellants,	:	Case No. 95-2258
v.	:	ENTRY
City of Youngstown, Ohio, et al., Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Marion Urichich.

(Mahoning County Court of Appeals; No. 93CA221)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Supreme Court, U.S.
FILED
OCT 4 1996
OFFICE OF THE CLERK

(3)

No. 96-202

In The
Supreme Court of the United States
October Term, 1995

MARION URICHICH AND HELEN URICHICH,
Petitioners,

vs.

CITY OF YOUNGSTOWN AND ROCCO RUSSO,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

REPLY TO BRIEF IN OPPOSITION

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8 pp

IN ANSWER TO QUESTION PRESENTED FOR REVIEW

Respondent issued the following statement:

"Does Ohio Civil Rule 56 titled "Summary Judgment" violate a citizen's right to a trial by jury or is it a viable tool to end litigation when there is an absence of material facts concerning the essential elements of the case?"

The above statement by Respondent is secondary and should be considered by this court but the primary question that should be considered by this court is found on page ii of Petitioners' Writ of Certiorari.

"Whether a government entity can confiscate, destroy and/or deprive a citizen of his or her rights to property, held by deed free of encumbrances, without adequate compensation financial or otherwise unless a state of emergency exists and/or martial law has been declared."

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REPLY TO

RESPONDENTS' STATEMENT OF THE CASE

Respondents state on page 1 in their Brief in Opposition.

"On June 6, 1991, a civil complaint for damages was filed on behalf of petitioners against Respondents.

On June 28, 1991, Respondents answered and on April 28, 1992, a Motion for Summary Judgment was filed on behalf of the Respondents."

The above first statement by Respondents is an unbelievable distortion of the truth. As a matter of fact, the litigation in question was filed on March 10, 1989 and is certified by the Appearance and Execution Docket that is part of the record in this case.

In response to the second paragraph, as a matter of fact, the initial judge that was appointed to hear this litigation was the Honorable Judge Peter C. Economus.

On June 1, 1990 Judge Economus issued a Judgment Entry denying the Defendants Summary Judgment and stated "Finds that there is a genuine issue as to a material fact" and therefore ordered that the motion for Summary Judgment by Respondent was overruled.

Attorney Charles E. Dunlap requested of Petitioners and the court to be relieved as Counselor for Petitioners. Petitioners engaged Attorney Norman L. Christley.

Attorney Christley informed the Petitioners that the case was filed improperly and recommended the case to be refiled adding Fireman Rocco Russo as a Defendant with the City of Youngstown.

The case was then assigned to Judge Michael A. Gerchak, mysteriously.

The evidence that was before the court was identically the same when Judge Economus overruled the Defendants' Motion for Summary Judgment filed on March 14, 1990.

The Defendants again filed a Motion for Summary Judgment on April 28, 1992. On December 28, 1992, Judge Gerchak then contradicted Judge Economus's opinion and sustained the Defendants' Motion for Summary Judgment.

Is it the practice of government entities to shop around until they find a Judge who agrees with government.

The record shows that a police officer assigned as a specialist in traffic accidents, Officer David Lomax, Report No. 19030, Youngstown Ohio Police Department, indicates damage scale heavy and contributing factor, driver error, failure to control.

In the deposition of Officer Lomax, on Page 45, line 2, he was asked if there was a City Ordinance that it would be a traffic violation in a motor vehicle accident for failure to control. Line 5, Yes. Page 45, line 10, question: Did you ticket Mr. Russo? Line 12, No, I did not. On Page 42, Officer Lomax was asked why his report of the accident was failure to control. Line 6, answer: I felt that Mr. Russo did not have control of the vehicle because he was not able to safely maneuver the vehicle over the normal travel of road.

Respondents address Ohio Civil Rule 56 and Federal Rule 56 and are trying to persuade this court not to examine the evidence that established without a reasonable doubt by Judge Economus that there is and was a genuine issue as to a material fact in this litigation and deny Petitioners a trial by a jury of their peers.

Respondents have taken certain paragraphs from the various depositions out of context so as to mislead this court.

Respondents have avoided in the Court of Appeals, Seventh Appellate District of Ohio, and the Supreme Court of Ohio, answering the facts presented to the courts pertaining to this great injustice.

Respondents are asking this court to set a precedence for the government of the people of this great nation to be able to destroy, confiscate, and/or damage private property without due compensation financially.

There is not a question in Petitioners' minds that Fireman Officer Russo did not intentionally destroy Petitioners' commercial building. Accidents occur by motor vehicles either by mechanical failure and/or the operator of any type of motor vehicle that is at fault in an accident being negligent by his or her failure to control said motor vehicle which constitutes wilful or wanton misconduct and therefore is a jury issue.

CONCLUSION

The record indicates without a reasonable doubt that this litigation should be returned to be heard by a jury of Petitioners' peers.

Given the facts of this case, reasonable minds could have found the City of Youngstown and Rocco Russo's action wilful, wanton, and/or reckless misconduct.

To deprive the citizens of this great nation the right to be compensated financially as Respondents request, for the destruction and/or confiscation by a government entity would destroy the very fabric and stability of our society.

Respectfully submitted,

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